

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 136 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

THAKORBHAI UKABHAI PATEL

Versus

CHHOTUBHAI UKABHAI PATEL

Appearance:

MR. N.D.NANAVATI SR. ADVOCATE FOR
MR DEVANG T SHAH for Petitioner

Mr. D.M.Thakkar for M/S THAKKAR ASSOC.
for Respondent No. 1
SERVED BY AFFIX.-(R) for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 21/12/2000

ORAL JUDGEMENT

#. Present respondent no.1 Chhotubhai Ukabhai Patel filed Special Civil Suit No.181 of 1994 in the court of 2nd Jt. Civil Judge (S.D) Surat for partition wherein his brothers, present appellant Thakorbhai Ukabhai Patel and present respondent no.2 Lallubhai Ukabhai Patel are the defendants. The suit is filed for partition of joint property of Hindu Undivided Family. Initially the plaintiff along with the above said suit also filed an application for interim injunction which was granted by the Trial Court in favour of the plaintiff and against the defendants praying relief that the defendants shall not transfer, assign etc.. of the suit property including relief of possession of some of the suit property which was granted in favour of the plaintiff by the learned Trial Judge and an appeal came to be filed by the present appellant in this court being Appeal from Order No. 183 of 1994 wherein vide order dated January 20, 1995 this court modified the injunction order granted by the Trial Court below exh.5 and directed that till final disposal of the Special Civil Suit No. 181 of 1994, defendants were restrained from transferring in any manner any immovable property and share certificates and from encashing any deposits with the banks and co-operative societies. A direction regarding proper accounts was also issued. Relief of possession was not granted by this Court to the plaintiff.

#. Thereafter it appears that since the property which is a piece of land admeasuring about 100 sq.yds. as per the say of the appellant's advocate which is the subject matter of this appeal is admittedly is in possession of the present appellant. The appellant after demolishing of the house which was in dilapidated condition started construction and an application exh.25 came to be filed by the plaintiff against the present appellant to restrain the present appellant and other defendants to construct upon the land which was in possession of the appellant.

#. After hearing vide order dated 18.2.1998 the learned 2nd Jt. Civil Judge (SD), Surat came to allow the application of the plaintiff exh.25 partly and the defendants including the plaintiff were directed to make construction upon 2/6th portion of the suit property only the number of which is 231/1/20 and 230/1/21, after obtaining permission from Gram Panchayat or from any other competent authority and the appellant and other defendants were restrained from making any further construction leaving 2/6th portion of the said suit property. Being aggrieved by the said order of the trial court, this Appeal from Order is filed.

#. Learned Sr.Counsel Mr. N.D.Nanavati for learned advocate Mr. D.T.Shah for the appellant while learned Sr.Counsel Mr. D.M.Thakkar for M/s Thakkar Associates on behalf of the respondents nos 1 and 2 were heard.

#. Mr. N.D.Nanavati on the ground of hardship submitted that the house was in a dilapidated condition and since the present appellant has nowhere to live by way of shelter had started construction. Without entering into further merits, Mr. Nanavati submitted that the construction, if permitted, will be made according to law applicable and strictly as per the rules prevalent. Learned advocate Mr. Nanavati further submitted that in equity the appellant may be directed to give an undertaking that if the decree for partition will be passed by the Trial Court, he shall not claim any equity on the construction made over the suit land. Mr. Nanavati further submitted that in case of partition, if other parties of the suit want construction, he would undertake to hand over his brothers the construction leaving his share without claiming any cost and further that, if in case of partition, if his other brothers do not wish to have construction, the remaining construction leaving his 1/3rd share will be demolished by the appellant at his own costs and the land will be made available to the other brothers who are parties to the suit. It is further submitted that the appellant shall construct in a manner that the constructed portion can easily be divided in 3 shares. It is further submitted that if permission is granted, the appellant shall construct at his own cost and in case of partition decree, leaving his share, he undertakes to entrust the remaining shares to his brothers and for this he will not claim any equity or costs. It was further argued that in this view of the matter in exercise of equitable jurisdiction, the appellant may be allowed to construct with an undertaking and all restraints which this court may place upon the present appellant.

#. As against this, learned advocate Mr. D.M.Thakkar argued that the construction which is proposed and being made is completely illegal in the sense that no permission required of the competent authority has been obtained. It is further argued that no court can allow to perpetuate the illegality and allow illegal construction. It is argued that the action of the present appellant demolishing the house was an illegal one and by permission, illegal construction which has no sanction of law cannot be permitted. He invited the attention of this court to paras 11 and 12 of the order

of the Trial Court wherein the Trial Court turned down the contention of the appellant on the ground that the construction without permission would be illegal and cannot be allowed. Mr. Thakkar has further argued that the concerned gram Panchayat has issued notices against the present appellant for demolition of the construction. It was further argued that this appeal has limited scope to examine whether the discretion used by the learned Trial Judge is judicious or not and on the ground mentioned on behalf of the appellant, the discretion used by the appellant cannot be brushed aside. It is submitted that no such arguments have been advanced on behalf of the appellant.

#. The controversy, having regard to the rival contention is whether present appellant can construct in the land which is in his possession and which is of the joint ownership. The ultimate object of the controversy is undoubtedly the partition of the property of which the parties to the suit are co-owners and therefore, ultimately either the suit can be decided in partition decree or the suit of the plaintiff can be dismissed. This court in this matter deals in equitable jurisdiction. In Gram Panchayat , Umbergaon & ors. vs. Navin C.Mehta & anor. as reported in 1994 GLH 601 This court relied on the following observation from the decision of Aynsley vs. Glover reported in (1874) 18 Eq. 544 :

" The undertaking that was contemplated by the aforesaid decision was an undertaking to pull down the building if the court should so think fit, which meant that the court in that case had still a discretion to decide at that time of hearing of the suit whether the party injured by the erection of those buildings should be paid compensation in damages or the defendant should be directed to pull down his new building. In such a case, allowing the defendant to build on the land pending suit would mean putting him in an advantageous position as regards the plaintiff when the case comes to a hearing. In the present case the undertaking that was given in the lower court appears to be an unconditional one to pull down and remove the building without raising any claim for compensation in case the plaintiffs were found entitled to recover possession of the property. In such a case the question of putting the defendant in an advantageous position vis-a-vis the plaintiff does not arise and the court is not called upon to decide whether it

thinks fit to direct the pulling down of the building"

This court in Gram Panchayat Umbergaon case (supra) further observed that:

" In the present case also the respondents Nos.

2 to 4 are prepared to give an undertaking to the trial Court that if a final decree is passed against them, they would not claim in any set of circumstances that the construction which they intend to put upon the suit plots should not be pulled down before the Court. They themselves would pull down the said construction at their own cost and risk. In this set of circumstances, it cannot be said that the respondents Nos. 2 to 4 would be placed in any advantageous position as against the appellant when the case comes to a hearing because the respondents Nos. 2 to 4 are prepared to give unconditional undertaking to pull down and remove the building without raising any claim for compensation or without raising any claim of equity or without raising any claim that by pulling down the factory sheds the labourers in the factory would be placed in difficulty. Therefore, in this type of a case the question of putting the respondents Nos. 2 to 4 in advantageous position vis-a-vis the appellant does not arise because the Court would not be called upon to decide whether it thinks fit to direct pulling down of the construction made by the respondents Nos. 2 to 4"

The the court in the said decision further relied upon the observation in Aynsley's case (Supra) as under:

" The Court after considering the balance of convenience granted the interim injunction. The purpose behind the grant of temporary injunction is to protect legal rights and to avoid future injury during the pendency of litigation until the disposal of the suit. Now here looking to the fact that respondents Nos 2 to 4 are prepared to give an undertaking as stated above, it cannot be said that any legal rights of the appellant would be affected in any way"

#. The ratio as it appears that in equitable jurisdiction when the parties are not put to any disadvantageous position, in proper cases the

construction may be allowed subject to the final verdict of the court. In the present case the position is more strengthened by a fact that present appellant is the co-owner of the land in which he is in possession. He is prepared to give an undertaking for the pulling down the construction. As stated above, the ultimate object of the controversy is whether a decree of partition can be passed or not and whether if decree is passed, then present construction can come in the way of execution of such decree or whether the construction will put the plaintiff to any disadvantageous position. Assuming against the appellant to the ultimate extent then even if a partition decree is passed by allowing construction, other parties will not be put to an disadvantageous position due to the undertaking by the appellant and the restrictions put by the court. Mr. Thakkar relied upon a decision the case of Mansinghbhai Kahalsingbhai & ors. vs. Surat Municipal Corporation & ors. 2000 (2) GLH 269 for the contention that unauthorised and illegal construction cannot be compounded and has to be demolished and judicial discretion cannot be guided by expediency. The courts are not free from statutory fetters. Similarly Mr. Thakkar also placed reliance on a decision of the Apex Court in M.I.Builders Pvt.Ltd. vs. Radhey Shyam Sahu & ors. as reported in AIR 1999 SC 2468 Stressing para 82 of the above decision learned advocate submitted that such discretion cannot be exercised by the court which encourages illegality or perpetuating illegality. Unauthorised iconstruction if at all illegal and cannot be compounded and has to be demolished.

#. The facts of the present case are altogether different. In the present case the appellant is a sharer of the property. The construction he proposes to carry out is subject to restriction and undertaking by the appellant. The appellant is admittedly is in possession of the suit property with a strict rider of pulling down the construction if so desires by the other party in case of partition decree. The construction therefore, at this stage on the whole of the land is required to be permitted in equitable jurisdiction. The rule is that illegal or unauthorised construction cannot be compounded as per the principles as established in above two decisions as relied upon by the learned advocate Mr. Thakkar. But here it is not a case to compound of illegal construction or perpetuating any illegality in view of the strict directions that not an inch of the construction shall be carried out by the appellant in breach of the law and in breach of the rules applicable to the appellant on the suit land. In this view of the

matter the appeal is required to be allowed and the following order is passed.

The appeal is allowed. The order passed by the Trial Court on 18.2.1998 below exh.25 is modified to the extent that the appellant shall be permitted to construct over the suit land on the following terms and conditions:

- (i) The appellant shall strictly adhere to the undertaking submitted by him before this court on 3.8.1998 on affidavit which shall be read as a part and parcel of this order. Appellant is further directed to furnish a copy of such undertaking to trial court at the earliest.
- (ii) The appellant shall construct in a manner that in case of partition decree the three divisions can easily be made of the construction and after leaving 1/3rd portion the remaining portion could be divided without any complications.
- (iii) The appellant shall not start construction without obtaining permission of competent authority and shall not make any construction in breach of law and rules prevalent which will amount to breach of the order of this court.
- (iv) In case of partition decree without claiming any equity the appellant shall hand over leaving his share in the construction remaining part to the respective party if they so desire and if any party so desire then the construction will be pulled down at the costs of the appellant and land shall be handed over to such party to the suit.

Learned Trial Judge is hereby directed to dispose of the Special Civil Suit No.. 181 of 1994 within 3 months from the date of receipt of the writ of this court or producing certified copy of this order before the Trial Court by any of the parties. The office is directed to transmit the writ to the Trial court as early as possible but not later than a week time in any case. The office is directed to forward to the trial court along with the writ, a copy of the undertaking placed on the record by the appellant, which is on affidavit sworn in on

3.8.1998.

With the above said order this Appeal from Order
and the Civil Application No.2850 of 1998 both are
disposed of.

(J.R.Vora.J)

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